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Supreme Court of the United States

October Term, 1948

EDITH MATTHEWS and AGNES BULLINGS,
Petitioners,

v.

MARY WOODY, DONALD B. HOWARD, ROY NELSON, and BENJAMIN HILL,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

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WILSON - EPES PRINTING CO. - RE 5003 - WASHINGTON 1, D. C.

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SUMMARY STATEMENT OF MATTER INVOLVED

One Ellen Marshall died in the District of Columbia in January, of 1945. At the time of her death she was 79 years of age, and at the age of 73 she made the will in controversy (R. 28). Petitioners are nieces of Ellen Marshall and her sole surviving heirs at law and next of kin (R. 142, 144). By the terms of her will, the decedent devised and bequeathed valuable real and personal property to persons who resided in the neighborhood where decedent lived, and she bequeathed the sum of $100.00 to each of the petitioners (R. 1).

Petitioners filed a caveat to the will in the District Court of the United States for the District of Columbia (R. 3), contending that the will was invalid, and that the decedent lacked testamentary capacity at the time that the will was executed, and further that the will was executed under persuasion of undue influence. The evidence showed that petitioners resided in the District of Columbia and were on friendly terms with their aunt (R. 125). The evidence failed to disclose any apparent reason why decedent should have preferred outsiders to her next of kin (R. 127).

At the trial in the District Court below on the issues made, one of the witnesses to the will, Mary Theresa Hill, testified that decedent had executed the will after the witnesses to the will had signed the instrument. For purposes of precision, her testimony on the point is recited (R. 66, 67):

> Q. No, who signed first? A. Grace Washington was the first to sign the will.
> Q. Grace Washington signed the will before Mrs. Marshall signed it? A. Yes, she did.
> Q. And then Mrs. Marshall signed it? A. Mrs. Marshall was the last to sign the will.

In the course of the trial, one of the witnesses for the caveators, Nellie B. Shamwell, related that at about the time of the execution of the will, decedent had some difficulties with respect to property owned by her and that she got a gun to shoot a man (R. 127), and that at about that time she was "terrible" (R. 130), and that "she just seemed to go off; just went haywire" (R. 134), and that she "would fly off so" (R. 137).

Other evidence established a close and confidential relationship between decedent and some of caveatees existing for a period of many years (R. 111, 117).

At the close of caveator's evidence, the trial Justice directed the jury to return a verdict for the caveatees (R. 166). On appeal to the United States Court of Appeals for the District of Columbia, that Court affirmed the action of the District Court below (R. 9).

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. A wide division of authorities has arisen in State Courts on the question of the validity of a will signed by a decedent after it has been subscribed by the witnesses to the will.

2. It is contended that the ruling of the District Court of the United States for the District of Columbia and affirmed in the United States Court of Appeals for the District of Columbia holding as a matter of law that the will signed by decedent after it has been subscribed and attested by witnesses is valid is contrary to principles of law announced in prior decisions of the United States Court of Appeals for the District of Columbia over many years[1], and is contrary to purposes of attestation announced by this Honorable Court[2].

3. The question raised is of vital importance to determine the validity of wills and it is believed that the matter of subscription and attestation involved in this action is of sufficient importance for this Honorable Court to determine the question raised so that important property rights may be settled.

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[1] See, Re, Porter, 9 Mackey 509, Peters v. Peters, 64 App. D. C. 331, 78 F. 2d 215, Bullock v. Morehouse, 57 App. D. C. 231, 19 F. 2d 705, discussed p. 6 of brief.

[2] Keely v. Moore, 196 U. S. 38, 25 S. Ct. 169, 49 L. Ed. 376, discussed p. 7.

4. It is further contended that the evidence was sufficient to take the question of testamentary capacity and undue influence to the jury, and the petitioners were deprived of their right of trial by jury by the action of the trial Justice in refusing to submit the matter to the jury for findings on the issues.

PRAYER FOR WRIT

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, directing that Court to certify and send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the said United States Court of Appeals for the District of Columbia be reversed by this Honorable Court, and that your petitioners have such other and further relief as to this Honorable Court may seem meet and just.

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BRIEF IN SUPPORT OF PETITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia appears in the record at p. 9.

JURISDICTION

Writ of certiorari is prayed herein pursuant to the authority of sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938, 939), to review the decree of the United States Court of Appeals for the District of Columbia entered herein on April 21, 1948.

SPECIFICATION OF ERRORS

1. The Court of Appeals below erred in holding that the will of Ellen Marshall was validly executed.

2. The Court of Appeals below erred in refusing to rule that the trial Justice should have submitted to the jury the question of whether decedent signed the will after the witnesses had subscribed their signatures to the will.

3. The Court of Appeals below erred in refusing to hold that under the applicable statute, a will must be executed by the decedent before subscription and attestation by witnesses.

4. The Court of Appeals below erred in holding that there was no evidence of undue influence or lack of testamentary capacity which required the issues to be submitted to the jury.

SUMMARY OF ARGUMENT

1. A will is not valid in the District of Columbia unless executed by the decedent before it is subscribed and attested by the attesting witnesses.

2. The testimony of one of the attesting witnesses that the will was signed by decedent after the will was signed by the attesting witnesses required the issue to be submitted to the jury to determine if decedent signed before or after the witnesses to the will subscribed their names to the instrument.

3. The evidence submitted by the caveators required the issues of testamentary capacity and undue influence to be submitted to the jury.

ARGUMENT

POINT 1. Title 19, Sec. 103, D. C. Code (1940 ed), provides:

> All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses, or else they shall be utterly void and of no effect. . . . (Mar. 3, 1901, 31 Stat. 1433, ch. 854, par. 1626.)

Whether a will must be signed by a decedent before it is subscribed and attested by witnesses to the will has been considered by many courts. The rule of law reached by these courts is announced in 28 RCL 128, as follows:

> According to one line of authorities a will must be signed by the testator before there can be any valid subscription by the attesting witnesses. The latter cannot properly sign the will before the testator but must wait until the maker of the will himself has signed it, and this is true even though all the signing is done as part of one transaction. . . . the rule that the testator must sign first is not fully accepted in all jurisdictions. Thus, it has been held in a number of cases that where the execution and the attestation of the will occur at the same time and place and form parts of the same transaction, it is immaterial that the witnesses subscribe before the testator signs so that the attestation immediately precedes instead of succeeding the execution.

Jarman on Wills, Vol. 1, P. 113, provides:

> It follows from what has been above stated that the will must be signed by or for the testator and *his signature must be acknowledged before either of the witnesses signs.* (emphasis supplied).

The United States Court of Appeals for the District of Columbia has considered required formalities for the execution of a valid will in *In Re Porter,* 9 Mackey 493, 509;

Peters v. Peters, 64 App. DC 331, 78 F2d 215; and *Bullock v. Morehouse*, 57 App. DC 231, 19 F2d 705. In *Re Porter's Will*, supra, the Court held in its opinion:

> We accept as authoritative the line of cases which we have cited. They show that, within the meaning of the statute of 29 Charles II, attestation is properly made, *either when the witness has seen the testator sign the instrument, or has heard him after it has been signed, acknowledge that the act was his* (emphasis supplied).

In *Peters v. Peters*, supra, the Court held that a question as to attestation was a jury question stating:

> One of the witnesses testified that she did not know whether the testator's signature was written on the paper when she signed as witness. Later she stated that the testator's signature was not on the will when she signed it.
>
> We have therefore here a case in which one of the witnesses testifies under oath to all the circumstances required for the admission of the will to probate. The other repudiates the attestation clause and denies that the testator was present when the witnesses signed; and this question of fact the jury decided in favor of the validity of the will.

Bullock v. Morehouse, supra, raised the question of the correctness of the trial court's charge to the jury. The charge and principle of law announced in the opinion believed to support petitioners' position here is quoted:

> The instructions granted at the request of the caveatees were to the effect that it is not essential to a valid execution by a testatrix that the subscribing witnesses see her sign the will, or see her signature on the will, if in fact the testatrix signs before the subscribing witnesses, and before they sign, acknowledges to them that she has executed it, and that this acknowledgment may be in any form or words that enables the witnesses to understand that the paper is her act.

> After its analysis of the White case, and many other authorities, the court said: "We accept as authoritative the line of cases which we have cited. They show that, within the meaning of the statute of 29 Charles II, attestation is properly made, *either when the witness has seen the testator sign the instrument or has heard him, after it has been signed, acknowledge that the act was his*" (emphasis supplied).
>
> See also, *Notes v. Doyle,* 32 App. DC 413.

Obviously, the United States Court of Appeals for the District of Columbia has always considered that a will must be signed by the decedent prior to subscription and attestation by the witnesses to the will. This Honorable Court in *Keely v. Moore,* 196 U. S. 38, 25 S. Ct. 169, 49 L. ed. 376, considered the purpose of attestation stating:

> It is argued that Cooksey did not intend to attest the will, but merely to sign the certificate; but the certificate of what? Only the fact that the will was acknowledged in his presence and that the signature was genuine. This is precisely the object of an attestation, and as an attestation we think it must be regarded.

The purpose of attestation being as stated, it perforce must follow that there must be an execution of the will before the will can be acknowledged as the will of the decedent, and it must be signed before attested so that the decedent can demonstrate the signature to be genuine before the witnesses can attest to the fact. The cases cited as heretofore controlling in the District of Columbia indicate that the Court of Appeals below always considered that a will had to be signed by the decedent before it could be attested by witnesses.

It is therefore considered that the opinion of the Court of Appeals in this case (R. 9) is contrary to the prior opinions of that Court and contrary to the purpose of an attestation as stated by this Honorable Court, and it is respectfully urged that the opinion of the Court of Appeals below should be considered for determination whether it should be upheld or reversed.

The prior opinions of the Court of Appeals indicate that the will should be signed by the decedent before it is subscribed by witnesses is based on reason and purpose. In *Marshal, Exec. v. Mason,* 176 Mass. 216, 57 N. E. 340, the Court emphasized the reason for the rule holding:

> The manifest intention of the Statute is that, first, the will should be put in writing and signed by the testator; second, his will so written be attested by the witnesses; and third, the witnesses subscribe in his presence in evidence of their attestation to his written will.

The opinion written by Chief Justice Holmes held that a will executed under identical circumstances with the testimony related by the witness Mary Theresa Hill.

POINT 2. Assuming that petitioners are correct in their contention that the will in question would be invalid if subscribed by the witnesses before execution by the decedent, the question of the priority or time of signing should have been submitted to the jury. The other attesting witness testified that decedent had signed the will before the witnesses subscribed and attested the instrument. The witness Mary Hill testified that decedent signed first (R. 66, 67). Under the ruling in *Peters v. Peters,* supra, the question should have been submitted to the jury.

POINT 3. The testimony given on behalf of the caveators showed that the decedent was 73 years of age at the time that the will in question was executed by her. Further, that at about that time decedent had gotten a gun to shoot a man, and that she was acting "terrible" (R. 127, 130), and "she just seemed to go off; just went haywire" (R. 134). This constituted substantial evidence for the caveators on the issue of mental capacity and the trial Justice should have permitted the issue of capacity to be decided by the jury. See, *McCartney v. Holmquist,* 70 App. DC 334, 106 F.2d 855.

This evidence taken in connection with the testimony on behalf of the caveators of the close association of certain of the caveatees with the decedent (R. 111, 117) following the death of decedent's husband, her age, her difficulties with her properties, and with no apparent reason for her to favor strangers to her sole next of kin was sufficient to require the trial Justice to submit the issues to the jury. His failure to do so denied to the caveators their right of trial by jury.

It is submitted that the petition for writ of certiorari should be allowed.

Respectfully submitted:

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BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

(Note: The printed record before this Honorable Court is so meagre that respondents find it extremely difficult to furnish a complete statement of the case with the appropriate page references to the record. Even the attestation clause to the will in question is omitted.)

The will in controversy (R. 2a, 3a) was signed by the testatrix and two subscribing witnesses in the presence of each other on the same occasion and as a part of one continuous transaction (R. 9). One witness testified that the testatrix signed first and the other that the testatrix signed last (R. 7a). (Counsel finds it difficult to follow petitioners' contention here in view of the statements on

page 10 of their brief that both witnesses testified that the "decedent signed first" before the witnesses.)

The trial court heard the testimony and ruled that the testimony showed that the will was properly attested in the District of Columbia and that its ruling would have been the same even if it had been definitely established that the testatrix signed last (so long as the parties signed on the same occasion and as a part of one continuous transaction).

The United States Court of Appeals for the District of Columbia affirmed the judgment of the trial court (R. 9).

As to the question of undue influence, the appellate court found that there was no basis for the contention that there was such evidence (R. 9).

ARGUMENT

I. The Will Was Properly Attested in the District of Columbia Even if the Testatrix Signed Last.

The trial court ruled that, as a matter of law, the will in question was properly executed in the District of Columbia.

The Court of Appeals, in sustaining the trial court, held that "the validity of a will should not depend upon who signs it first; provided, of course, all sign at substantially the same time and in each other's presence, *which they did here*". (Underscoring supplied). In so doing, the court followed the greater weight of authorities in this country, some of which are:

California—In re Silva's Estate, 169 Cal. 116, 145 Pac. 1015;

Colorado—In re Shapter's Estate, 35 Colo. 578, 117 Am. St. Rep. 216, 6 L. R. A. (N. S.) 575, 85 Pac. 688;

Connecticut—O'Brien v. Galagher, 25 Conn. 229;

Illinois—Gibson v. Nelson, 181 Ill. 122, 72 Am. St. Rep. 254, 54 N. E. 901;

Indiana—Harmening, et al. v. Harmening, et al., (1926), 84 Ind. App. 459, 150 N. E. 376, annotated: 6 Boston University Law Review 207, and criticizing and distinguishing *Reed v. Watson,* (1867), 27 Ind. 443;

Kentucky—Swift v. Wiley, 40 Ky. (1 B. Mon.) 114;

Maryland—Sellers v. Hayden, 154 Md. 117, 57 A. L. R. 828, 140 Atl. 56, annotated: 6 New York University Law Quarterly Review 186;

Michigan—In re Horn's Estate, 161 Mich. 20, 26 L. R. A. (N. S.) 1126, 125 N. W. 696;

Mississippi—Gordon v. Parker, 139 Miss. 334, 39 A. L. R. 931, 104 So. 77, annotated: 10 Minnesota Law Review 76;

New York—In re Jones' Estate, (1936), 285 N. Y. Supp. 894, 157 N. Y. Misc. 857, annotated: 21 Cornell Law Quarterly 674 and 5 Fordham Law Review 519;

North Carolina—Cutler v. Cutler, 130 N. Car. 1, 189 Am. St. Rep. 854, 57 I. R. A. 209, 40 S. E. 689;

Ohio—Slemmons v. Toland, 5 Ohio App. 201, 25 O. C. C. (N. S.) 485;

Pennsylvania—Miller v. McNeill, 35 Pa. 217, 78 Am. Dec. 333;

South Carolina—Kaufman v. Caughman, 49 S. Car. 159, 61 Am. St. Rep. 808, 27 S. E. 16;

Virginia—Rosser v. Franklin, 47 Va. (6 Gratt.) 1, 52 Am. Dec. 97;

Wisconsin—Enright v. Griffith, 165 Wis. 601, 163 N. W. 138.

The Court of Appeals held that the requirements of the statute of the District of Columbia on execution of wills had been met (R. 9). That statute (D. C. Code (1940),

section 19-103, 31 Stat. 1433, ch. 854, sec. 1626) reads, as follows:

> "All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses * * *."

That statute is strikingly similar to the corresponding statute of the State of Maryland. The appellate court below agreed with the opinion and decision of the Court of Appeals of Maryland in the case of *Sellers v. Hayden, supra,* wherein the precise question was passed on for the first time (1928) and wherein is contained an exhaustive and thorough review of the authorities. To the same effect, see Page on Wills (3rd Edition), Vol. 1, Sec. 372, pages 672 to 677, inclusive.

Examination of the cases cited by petitioners discloses that none of them involved a situation where a witness signed prior to the testator.

The weight of authority clearly holds that a will is not invalidated by the testator signing subsequent to the witnesses where he and the witnesses sign on the same occasion and as a part of one continuous transaction. The exception, of course, is where the particular statute involved specifically prescribes the order of signing wills.

In the case at bar, the trial court's holding that the will was valid and would be so even if the testatrix had signed last, was properly affirmed.

II. The Appellate Court Did Not Err in Finding No Basis for Petitioners' Contention That There Was Evidence of Undue Influence.

There was no evidence before the trial court or the Court of Appeals that the testatrix lacked mental capacity, that she was unduly influenced, that the execution of the will was induced by any fraud or deceit, or that the execution

was invalid. The absence of any such testimony in appellants' appendix below (not "Joint" as stated here on R. 11) is readily understandable. The identical record before the appellate court is now before this Honorable Court (R. 2a-8a, inclusive).

CONCLUSION

It is urged that the petition for writ of certiorari should be denied.

Respectfully submitted,

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